

THE STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF
THE RULES OF PROFESSIONAL CONDUCT

MEETING SUMMARY - OPEN SESSION

Friday, October 11, 2002
(9:30 am - 12:20 pm)

Doubletree Hotel – Monterey
Redwood II
2 Portola Plaza
Monterey, 93940
(831) 649-4511

MEMBERS PRESENT: Harry Sondheim (Chair); JoElla Julien; Ellen Peck; Stanley Lamport; Raul Martinez; Kurt Melchior; Jerry Sapiro; Mark Tuft; Paul Vapnek; Tony Voogd

MEMBER ATTENDING BY TELEPHONE: Linda Foy

ALSO PRESENT: Kevin Mohr (Commission Consultant); Randall Difuntorum, Audrey Hollins, Lauren McCurdy, Mary Yen (State Bar staff); James Biernat (BASF Ethics Committee); David Boyd (Sacramento County Bar Association); James Fox (CDAA Ethics Committee); Diane Karpman (Beverly Hills Bar Association); Sandra B. Price (Executive Committee of the Trusts and Estate Planning Section of the State Bar); Toby Rothschild (Access to Justice Commission); Dorothy Tucker (Former Member, State Bar Board of Governors).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM SEPT. 13, 2002 MEETING

The open session summary was approved, as amended. (Revised summary attached.)

II. REMARKS OF CHAIR

A. Preparation for Public Hearing

Mr. Difuntorum presented an oral report on the speakers registered for the public hearing scheduled for the afternoon. Copies of speaker's registration forms were distributed. Ms. McCurdy was commended for developing a helpful display sign alerting Annual Meeting attendees about the public hearing.

B. Meetings

Mr. Sondheim underscored the importance for consistent member attendance at scheduled meetings. Members were instructed to contact staff and the Chair as soon as it is known that a member will miss a scheduled meeting.

III. MATTERS FOR ACTION

A. Consideration of Rule 1-110. Disciplinary Authority of the State Bar

Matter not called for discussion. No materials received.

B. Consideration of Rule 1-120. Assisting, Soliciting, or Inducing Violations

The Commission considered an October 1, 2002 memo and alternate drafts of proposed amended RPC 1-120 submitted by Mr. Tuft and included in the October 11, 2002 agenda materials beginning at page 19. During the discussion, the following points were considered:

- (1) the discussion of a member's permissive ability to report another lawyer's misconduct is properly included as part of RPC 1-120 as that RPC is the closest parallel to ABA MR 8.3;
- (2) RPC 5-100 is not an appropriate place for the issue of reporting misconduct as it would be difficult to find because there is no corresponding ABA model rule;
- (3) the discussion of the breadth of language describing a member's permissive ability to report another lawyer's misconduct raises a RPC 1-100 issue as to the purpose and function of the RPCs overall;
- (4) this issue does not raise a RPC 1-100/purpose of the RPCs question because the RPCs presently include rules such as RPC 3-600 (Organization as Client) and RPC 2-300 (Sale of a Law Practice) that offer guidance on conduct that a lawyer may, but is not required, to perform;
- (5) the Commission is instructed to consider the ABA rules; some states have adopted a rule on reporting another lawyer's misconduct; attorneys need guidance on whether or not California has a reporting requirement;
- (6) the discussion sections in RPCs state what a rule is or is not intended to do; however, the current recommended draft of RPC 1-120 would be distinct from existing RPCs because of the proposed use of the phrase "[a] member may not. . ." in a rule discussion section;
- (7) it seems awkward and inappropriate to include in RPC 1-120 a reminder that members must comply with the duty of confidentiality set forth in BPC 6068(e);

(8) reference to BPC 6068(e) in the discussion is necessary for attorneys who need the clarification, and particularly where the client is another attorney;

(9) the proposed new paragraph (B) should be revised to use the word “misconduct” or the phrase “possible misconduct” rather than simply “conduct”;

(10) the word “another” must qualify the word “lawyer” in paragraph (B) to avoid confusion and conflict with existing mandatory self reporting provisions;

(11) proposed new paragraphs (A) and (B) belong in separate rules as there is little, if any, topical connection between them;

(12) the proposed new discussion section seems to “tilt” in the direction of a member not reporting misconduct;

(13) the proposed new discussion section should be modified to include a sentence explaining why California has a permissive reporting policy, maybe language similar to ABA MR 8.3(a) (re misconduct raising substantial questions as to honesty and fitness as a lawyer) could be used;

(14) the “tilt” concern might be addressed by reworking the discussion to identify factors to consider, pro and con, in order to assist a member in determining when reporting is appropriate;

(15) the language must be carefully crafted as there is a risk that declarative, prohibitory language in a RPC discussion section may be used as a basis for charging misconduct in a State Bar disciplinary matter;

(16) one different approach would be to rework the rule to prohibit reporting under specified circumstances and to state that in all other circumstances reporting is permitted but not required.

Following a general discussion, the Commission considered specific modifications to the version of proposed amended RPC 1-120 recommended by Mr. Tuft. The modifications considered are indicated by the bracketed language below:

“Rule 1-120. Assisting, Soliciting or Inducing Violations and Reporting Professional Misconduct.

- (A) A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.
- (B) A member may, but is not required to, report to the State Bar the [+mis+]conduct of another lawyer unless precluded by these rules or other law.

Discussion:

[+In deciding whether to report misconduct, a member may consider. . . (concept of ABA MR 8.3(a))+]]

[+This rule is not intended to [allow/require] a member to report the misconduct of a lawyer if doing so+] [-A member may not report the misconduct of another lawyer if doing so-] would violate the member's duty of protecting confidential information of a member's [+own+] client as provided in Business and Professions Code section 6068, subdivision(e), [-or would prejudice the interests of the member's client, or would involve the [+unauthorized+] disclosure of information received by the member in the course of participating in an approved lawyer's assistance program.-]”

To ascertain consensus, several straw votes were taken. On the question of whether paragraphs (A) and (B) belong together in RPC 1-120, the vote was Yes: 6; No: 3; Abstain: 1. On the suggestion to replace the word “conduct” with “misconduct” in paragraph (B), the vote was Yes: 9; No: 0; Abstain: 1. On the question of whether there should be discussion section language, the vote was Yes: 9; No: 1; Abstain: 1. On the suggestion that the discussion section language should be reworked to reflect a balanced tone that does not seem to dissuade permissive reporting, the vote was Yes: 9; No: 1; Abstain: 1. On the suggestion that language similar to the ABA MR 8.3(a) should be utilized to help implement a balanced tone, the vote was Yes: 9; No: 1; Abstain: 0.

Mr. Tuft was assigned to redraft RPC 1-120 in accordance with the Commission’s discussion and to submit the draft to staff for a 10-day mail ballot process. The rule will be sent to Commission members for a 10-day mail ballot vote. If two (or more) Commission members object to the draft, then the draft will be placed on the next agenda for further consideration. If there are less than two objections, the draft will be deemed tentatively approved. (Note that Commission members who object will be required to state a reason for their objection.)

C. Consideration of Rule 1-100. Rules of Professional Conduct, In General

The Commission considered a memo and a draft of proposed amended RPC 1-100(A) submitted by Mr. Lamport, as commented upon by Ms. Julien and Mr. Melchior. During discussion, the following points were considered:

- (1) while it can be agreed that the rules have a disciplinary purpose and a State Bar enforcement function, the question remains as to whether RPC 1-100 ought to recognize expressly that there are other purposes and uses of the rules;
- (2) the rules are used in non-disciplinary settings, particularly in civil litigation matters but that does not dictate that the rules should codify related legal principles that arise in those settings, such as the imputed knowledge concept and the substantial relationship test;
- (3) RPC 1-100 is the most important rule as it is the basis for evaluating all of the other rules;
- (4) RPC 1-100 restates many matters that are covered in the State Bar Act and the Commission should consider deleting this repetitive information;
- (5) Many members and OCTC view the RPCs as being minimum standards of professional conduct; it is not part of the Commission's charge to oppose or promote the use of the rules for determining civil standards of care and, even if it were, RPC 1-100 is an ineffective mechanism for dictating how a civil court might use a rule; if the Commission is not careful to point out that the purpose of the rules is discipline, there could be an unintended change of the standard of care in the civil arena;
- (6) a minimalist approach to RPC 1-000 could result in a rule that provides inadequate guidance to lawyers;
- (7) RPC 1-100 should address the concept that members enter into a commitment when choosing to join the legal profession, in other words, members agree to abide by certain standards in exchange for the right to practice law;
- (8) although the ABA Model Rules go too far in being aspirational, the RPCs should not be simply a disciplinary code for lawyer conduct;
- (9) 4 functions the RPCs serve are: protect clients, protect the public/courts/legal profession, maintain high professional standards; and preserve public confidence in the legal profession;
- (10) the enabling State Bar Act provisions (BPC 6076, 6077) may be construed to constrain the breadth of any RPC 1-100 statement of the purpose and function of the rules; however, the Cal. Sup. Ct. acts to approve all RPCs including current RPC 1-100, that seems to go beyond the limited concepts found in the enabling State Bar Act provisions;

(10) the topic of civil liability currently appears in both the rule text and the discussion section, consideration should be given to relocating the topic to one or the other part of the rule;

(11) practicing lawyers need rules that guide conduct, whether civil liability applies is a different question requiring reference to case law (i.e., *Pringle v. La Chappelle*);

(12) the emphasis on public protection in RPC 1-100 tends to submerge the client protection focus that distinguish the California rules from the ABA;

Following a general discussion, the Commission considered specific modifications to the version of proposed amended RPC 1-100(A) that appears on page 3 of the August 29, 2002 memo from Mr. Lamport. The modifications considered are indicated by the bracketed language below:

“(A) Purpose and Function.

The following rules are intended to regulate professional conduct of members of the State Bar [+and their willful violation may subject them to discipline+] [-through discipline-]. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077. Their purpose is to protect [+the consumers of legal services+] [the public/the rights of clients], to promote fair administration of justice and to promote respect and confidence in the legal profession [+and to provide guidance. . .+]. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.”

Although the first and second sentences are taken from current RPC 1-100, it was noted that the first paragraph mixes several concepts together. There was discussion of whether discipline, as enforcement, should be the focus of the first sentence, or the first paragraph, or whether the purposes of the RPCs should be discussed first. There was a sense that one of the purposes of the RPCs is to provide guidance to members.

To ascertain consensus, a vote was taken on the concept of moving the initial mention of “discipline” out of any first sentence of paragraph (A). The vote was: Yes: 6; No: 3; Abstain: 2. Mr. Sapiro explained that he abstained because it was unclear as to what any first sentence might state.

All members who are interested in doing so, including the current team of co-drafters, were assigned to prepare a redraft of the first paragraph of RPC 1-100(A) together with a proposed explanation. Tuesday, October 29, 2002, was set as the deadline for circulating redrafts by e-mail to every member. Members were asked to include Mr. Mohr and Mr. Difuntorum in the distribution of the redrafts.